

FIFTH DIVISION
March 21, 2014

No. 1-12-2560

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,)	Appeal from the
)	Circuit Court of
v.)	Cook County.
)	
)	No. 07 CR 20848
FLAMUR KABASHI,)	
)	
Defendant-Appellant.)	The Honorable
)	William G. Lacy,
)	Judge Presiding.
)	

JUSTICE TAYLOR delivered the judgment of the court.
Justices McBride and Palmer concurred in the judgment.

ORDER

¶ 1 *Held:* Summary dismissal of post-conviction petition alleging that the defendant was not advised that his guilty plea could lead to his deportation was upheld where the defendant had fully served his Illinois sentence prior to filing the post-conviction petition, and therefore lacked standing to file it.

¶ 2 Defendant Flamur Kabashi appeals from the summary dismissal of his post-conviction petition. On appeal, defendant contends that summary dismissal was improper because he was not admonished of the deportation consequences of his guilty plea to burglary, and because the State seeks to use the burglary conviction to enhance a new charge of unlawful use of a weapon by a felon.

¶ 3 On April 1, 2008, defendant executed a written jury waiver and a written waiver of a presentence investigation and written report, and pleaded guilty to burglary (reduced from a charge of residential burglary) in exchange for a sentence of 18 months of conditional discharge, to terminate on October 1, 2009. The post-conviction petition reflects that, at that time, defendant "was approximately seventeen years old" and "was not an American citizen." (The record reflects that defendant was actually 18 years old at the time of the plea. There is no other information in the record regarding defendant's citizenship, status, or country of origin.) The circuit court did not admonish defendant that the conviction could result in his deportation. Defendant did not file a post-plea motion or a direct appeal, and completed his sentence.

¶ 4 Subsequently, on May 9 or May 10, 2012 (file-stamps for both dates appear on the petition), defendant, through counsel, filed a petition for post-conviction relief, alleging that the circuit court violated his constitutional right to due process of law and his statutory rights under section 113-8 of the Code of Criminal Procedure of 1963 (725 ILCS 5/113-8 (West 2012)), and that the same defense counsel who filed the petition for post-conviction relief had violated his

right to effective assistance of counsel during the plea proceedings, by failing to admonish him that his guilty plea could lead to his deportation.

¶ 5 On July 27, 2012, the circuit court entered a written order summarily dismissing the post-conviction petition. The court found that defendant lacked standing because he had fully served his sentence before he sought post-conviction relief and therefore his liberty was no longer restrained by the sentence in this case. The court also observed that defendant did not claim that he was currently subject to deportation proceedings or any other immigration consequences.

¶ 6 On appeal, defendant contends that the summary dismissal was incorrect because (1) the circuit court's failure to admonish him at his plea proceeding that he could be deported if convicted, required that the guilty plea be vacated; (2) even though he had served the sentence for burglary he could be deported at any time based on the burglary conviction; and (3) the burglary conviction was being used to enhance the offense in a pending case. Defendant argues that this court should reject "the foolishness" of the Illinois Supreme Court¹ in *People v. Delvillar*, 235 Ill. 2d 507 (2009), and instead follow the wisdom of the United States Supreme Court in *Padilla v. Kentucky*, 559 U.S. 356 (2010).

¶ 7 The State responds that summary dismissal was proper because defendant lacked standing to seek post-conviction relief after having fully served his sentence. The State

¹We find this characterization of our supreme court's decision to be inappropriate, particularly since it is axiomatic that the appellate court does not have the authority to abandon the precedent of our supreme court. *Orr v. Edgar*, 298 Ill. App. 3d 432, 442 (1998).

alternatively responds that, if this court addresses the merits, the allegations in the petition were frivolous and patently without merit, and *Padilla v. Kentucky*, 559 U.S. 356 (2010), does not apply retroactively. The State further contends that the trial court's failure to admonish defendant of the deportation consequences of his guilty plea is not of constitutional magnitude and consequently is not cognizable in a post-conviction proceeding.

¶ 8 Our review is *de novo*. *People v. Carrera*, 239 Ill. 2d 241, 245 (2010).

¶ 9 When defendant filed his petition for post-conviction relief on May 9 or May 10, 2012, he had fully served his Illinois sentence, which terminated on October 1, 2009. Because he had fully served his Illinois sentence, he was not considered to be imprisoned in the penitentiary. *Carrera*, 239 Ill. 2d at 253, 258. Imprisonment in the penitentiary is required for standing to bring a petition pursuant to the Post Conviction Hearing Act. *Carrera*, 239 Ill. 2d at 259; 725 ILCS 5/122-1(a) (West 2012). In *Carrera*, deportation proceedings had been initiated against the defendant based on his guilty plea to possession of a controlled substance, and the Illinois Supreme Court ruled that the defendant's detention by federal immigration authorities was not imprisonment within the meaning of the post-conviction act because the defendant already had served his Illinois sentence. *Carrera*, 239 Ill. 2d at 253. Therefore, the defendant lacked standing to file a petition for post-conviction relief. *Carrera*, 239 Ill. 2d at 253, 259; see also *People v. Vinokur*, 2011 IL App (1st), 090798, ¶¶ 7-8.

¶ 10 Given our conclusion that the summary dismissal of defendant's post-conviction petition was proper based on his lack of standing to file it, we need not address the State's additional arguments. *Carrera*, 239 Ill. 2d at 259.

¶ 11 Finally, although defendant argues that the State is attempting to use the burglary conviction to enhance a new charge of unlawful use of a weapon by a felon, this argument is based on information that is *dehors* the record. Therefore, defendant failed to meet his burden of providing this court with an adequate record to support this claim of error. See *People v. Deleon*, 227 Ill. 2d 322, 342 (2008).

¶ 12 The judgment of the circuit court is affirmed.

¶ 13 Affirmed.